U.S. Department of Labor

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In the Matter of

DAVID L. CONNER
Claimant

v.

AUTEC RANGE SERVICES
Employer

and

CIGNA INSURANCE COMPANY
Insurer

Date Issued: July 19, 2001

Case No.: 1999-LHC-2370
OWCP No.: 02-120602

APPEARANCES:

Mr. Howard Grossman, Attorney
For the Claimant

Mr. Keith Flicker, Attorney
For the Employer

Ms. Donna E. Sonner, Attorney
For the District Director

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER -
MODIFICATION**

This case involves a claim filed by Mr. David L. Conner for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"), and as extended by the Defense Base Act, 42 U.S.C. §1651. The claim relates to a back injury Mr. Conner suffered on February 13, 1997. My decision in this case is based on the hearing testimony and all the documents

admitted into evidence: CX 1 to CX 3 and EX 1 to EX 7.[1]

Procedural History

In June 1997, the Employer terminated Mr. Conner's disability benefits. As a result, Mr. Conner, through his attorney, filed a claim for disability compensation benefits and requested a hearing before the Office of Administrative Law Judges ("OALJ") in December 1997.[2] The District Director forwarded the case to the OALJ in January 1998. Eventually, Administrative Law Judge James Guill conducted a hearing in Fort Lauderdale, Florida with the parties on June 26,1998. On March 23, 1999, Judge Guill issued a Decision and Order, 1998-LHC-973, directing the Employer to pay Mr. Conner both temporary and permanent total disability compensation benefits.

In May of 1999, counsel for the Employer asserted that a modification of Judge James Guill's March 23, 1999 compensation order was appropriate because Mr. Conner's medical condition had improved and he had not diligently looked for work since the hearing before Judge Guill in the summer of 1998. On July 16, 1999, the District Director forwarded the case to the OALJ for a hearing. Pursuant to a Notice of Hearing, dated March 7, 2000 (ALJ I), I conducted a hearing in Fort Lauderdale, Florida, on May 10, 2000. Mr. Conner, Mr. Grossman, Mr. Flicker, and Ms. Sonner were present.[3]

ISSUES.[4]

1. Whether Judge Guill's award to Mr. Conner of permanent total disability compensation should be modified due to a change in condition.

    A. Relevant community for determination of suitable alternative employment.

    B. Failure to pursue suitable alternative employment.

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[1]CX - Claimant exhibit; EX - Employer exhibit; TR - Transcript; and, ALJ - Administrative Law Judge exhibit.

[2]The administrative file contains a letter, dated December 29, 1997, from an U.S. Department of Labor claims examiner to the Employer's counsel informing him of the claim and request.

[3]Based on a stipulation between the Claimant and the Employer that Section 8 (f) relief was not an issue in this modification proceedings, Ms. Sonner declined to further participate in the hearing and departed (TR, pages 8 and 9).

[4]Although Mr. Grossman indicated some medical bills remained unpaid, Mr. Flicker represented that the Employer did not contest Mr. Conner's entitlement to medical treatment and would pay all medical bills. The parties agreed to settlement the matter administratively (TR, pages 19, 20 and 202).

2. If a change in conditions has occurred, determination of the extent of disability and appropriate disability compensation.

Parties' Positions

Employer

Although AUTEC Range Services ("AUTEC"), through its insurer, has been paying all compensation and medical benefits set out in Judge Guill's March 1999 Decision and Order, the Employer believes Judge Guill's compensation order should be modified because Mr. Conner has failed to diligently look for employment. In 1999 and 2000, the Employer provided Mr. Conner numerous job opportunities but he failed to contact any of the employers. Mr. Conner is a college graduate with a science degree. The jobs presented by the Employer meet his medical restrictions, which remain unchanged as evidenced by recent surveillance video. Mr. Conner has even conceded that suitable alternative employment existed in the West Palm Beach, Florida area since 1998 through May 2000 at a weekly salary that was at least equal to the average weekly wage at the time of his injury. As a result, Mr. Conner is no longer entitled to disability compensation.

Mr. Conner has raised the issue of whether the West Palm Beach, Florida area remains the relevant geographic region for employment in light of his subsequent travels. The Employer notes that West Palm Beach is the area Mr. Conner moved to after his injury (which occurred on Andros Island, Bahamas). In addition, Mr. Conner filed his disability claim while in West Palm Beach and still resided in the community at the time of Judge Guill's June 1998 hearing. His subsequent moves to Louisiana and Saint Croix were made for personal reasons, unrelated to employment, which do not create a new labor market. And, the Employer would suffer undue prejudice if West Palm Beach were not used as the relevant community due to the distances associated with the other locations and suppressed labor markets (TR, pages 15 to 19; and, post-hearing brief).

Claimant

Prior to his employment with AUTEC, Mr. Conner resided on his sailboat in Charleston, South Carolina, and received his mail at his brother's address in Charlotte, North Carolina. Mr. Conner then sailed to Andros Island in the Bahamas to work for the Employer. He was attracted to the island because he liked the lifestyle. Mr. Conner came to the West Palm Beach area solely to receive medical treatment and moored his sailboat at Jensen Beach, Florida. During his stay in Florida for his treatment, he lived on his sailboat.

The use of West Palm Beach, Florida as the location of suitable alternative employment is not appropriate. Mr. Conner has never resided in West Palm Beach, Florida. He only stayed there temporarily for medical treatment. When his economic condition deteriorated he moved to various other

locations which offered free housing, including Louisiana, Saint Croix and North Carolina. These moves where legitimate and created new labor market communities, which the Employer chose not to evaluate. Since the Employer has now failed to demonstrate suitable alternative employment in the community where Mr. Conner presently lives, the total disability compensation order should remain in place.

Judge Guill's finding establishes that Mr. Conner made a good faith effort to find employment in 1998. On at least one occasion after the hearing with Judge Guill, Mr. Conner unsuccessfully attempted to obtain an environmental position with a county in Florida. When his medical treatment was completed in the late fall of 1998, Mr. Conner left Florida and has never returned to state to live. After a short stay in Louisiana, Mr. Conner sailed to Saint Croix and tried to obtain a job with the island's main employer. While living in Saint Croix, he received a labor market survey for West Palm Beach. He called five employers on the survey from the island, but then decided he did not want to live in West Palm Beach. Mr. Conner also made multiple attempts in Saint Croix to find a job. In June 1999, he returned to Louisiana and made weekly efforts to find work. Then, in April 2000, Mr. Conner returned to North Carolina and presently intends to move to Saint Thomas soon. In summary, even if the Employer established suitable alternative employment, Mr. Conner has made good faith effort to find work since the June 1998 hearing. Consequently, his entitlement to total disability compensation should remain in place.

SUMMARY OF EVIDENCE

While I have read or viewed, and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues in this case. In addition, due to the nature of the issues before me, I have reviewed Mr. Conner's sworn testimony in the June 1998 hearing before Guill

Sworn Testimony Presented by the Employer

Mr. Victor F. Steckler[5]
(TR, pages 28 to 112)

[Direct Examination] Mr. Steckler is an employee of Intracorp which is a disability management company. He has worked for the company for about 22 years in the area of vocational rehabilitation assessment and placement. Mr. Steckler possess a Master's degree in psychology and vocational counseling.

In 1998, Mr. Steckler was tasked with preparing a labor market survey for the Palm Beach County, Florida area. He eventually testified in the hearing before Judge Guill and reviewed the judge's findings concerning the labor market survey. Judge Guill found 14 positions as acceptable suitable

[5]Absent an objection, I accepted Mr. Steckler as a labor market expert for the West Palm Beach, Florida area.

alternative employment (see EX 3 for job descriptions).

For the 1998 labor market survey (EX 3, pages 41 through 53), Mr. Steckler identified jobs through electronic means, principally the internet, that were consistent with Dr. Rolnick's physical capacity evaluation and his February 1998 interview with Mr. Conner. Essentially, Mr. Conner may do light duty work. He can stand for three to five hours, sit for five to eight hours and lift up to 20 pounds. Dr. Krost only imposed a 20 pound lifting restriction. At that time, Mr. Conner was 49 years old and possessed a Bachelor's degree in Biology. His work experience included four years of military service and jobs as a labor environmental technician for five years, a field biologist for three years, pest control supervisor for one year, and a foreman for about one year.

After identifying potential jobs for Mr. Conner, he contacted the employer to determine the availability of the employment. During the week of May 1, 2000, Mr. Steckler contacted the employers of the 14 positions that Judge Guill found suitable. Eleven of the employers indicated the jobs had been available off and on since 1998. Overall, a total of 39 job opportunities existed during this two year period. For example, the South Florida Water Management District had several openings for an individual with a degree in biology.

Using the same process, Mr. Steckler also prepared a labor market survey in May 1999 showing 11 available job positions (EX 3, pages 56 to 93). The jobs included charity caller, fund raiser, security officer, behavioral aide, account manager, staff science associate and counter-helper. In May 2000, eight of the eleven jobs had remained open for some period after the 1999 survey. The hourly wage started at $6. In addition, the availability of five jobs overlapped between 1999 and 2000. Mr. Steckler also identified 39 job leads for this period that appeared suitable for Mr. Conner. For these positions, he did not actually contact the employer.

Mr. Steckler conducted another survey in 2000 (EX 3, pages 95 to 101) and again found 11 suitable jobs, including service representative, sales associate, personal care instructor, watch guard, behavioral aide, and counter worker. The hourly wage ranged from $6 to $8.50.

According to Mr. Conner, he signed up for work with the Florida Employment Service. Mr. Steckler contacted the Florida Employment Service and discovered that due to cut-backs, the office personnel do not have sufficient time to do follow-ups contacts. As a result, it is usually up to the individual to continually come into their office to look for work. The state office offers several classes in job seeking skills. The state employment offices for Louisiana and the Virgin Islands have similar programs.

As a vocational rehabilitation specialist, Mr. Steckler believes an unemployed individual needs to make in-person contacts with employers. In addition, for a professional position, a detailed career statement and a resume are essential. Numerous resources are available to identify potential employers. Seeking employment requires consistent effort involving 20 to 30 hours a week. As a result, Mr. Steckler

considers at least 20 hours of consistent effort a week are necessary for a "good faith" job search.

[Cross Examination] Mr. Steckler did not conduct a labor market survey for Louisiana or Saint Croix. He does not have an office in Florida. He did not actually review Dr. Krost's medical records before the morning of the present hearing. Instead, Mr. Flicker informed him of Dr. Krost's medical limitations. He was not aware that Mr. Steckler was living in Louisiana until just a few days before the present hearing. Likewise, at the time he prepared the 1999 labor market survey, he was not aware that Mr. Conner was residing in Saint Croix.

Mr. Steckler considers work at a water treatment plant appropriate work for Mr. Conner. The failure of a person to receive a job offer that doesn't necessarily mean the individual didn't make a good faith effort to obtain work.

Mr. Steckler was not aware of Dr. Krost's belief that Mr. Conner required frequent changes in position. He really didn't consider Dr. Krost's restriction because he was not aware of them until recently. Mr. Steckler was aware that Mr. Conner was registered in at least one employment office in the Virgin Islands. He also knew Mr. Conner attempted to find work at a power plant in Louisiana.

Mr. Steckler didn't contact Mr. Conner prior to conducting the 2000 labor market survey because his transferable skills had not changed.

Documentary Evidence Presented by the Employer

Labor Market Surveys
(EX 3)

This exhibits contains multiple job opportunity listings from June 12, 1998 through May 1, 2000. Most of the job listings were referred to Mr. Conner's counsel. A few of the jobs were available in Jensen Beach, Florida. In May 1999, Mr. Steckler sent Mr. Conner's counsel over 23 job opportunities in the West Palm Beach area.

In addition, near the end of April 2000, Mr. Steckler asked some potential employers identified in the April 2000 labor market survey whether Mr. Conner had contacted them. Between May 1 and May 6, 2000, at least six employers indicated Mr. Conner had not called them about employment.

Discovery Responses
(EX 4)

Mr. Conner, through his attorney, responded to numerous interrogatories presented by Mr. Flicker. As of August 20, 1999, he had not earned any income through employment, or self-employment since June

26, 1998. Mr. Conner applied for an environmental job with Hess Oil and the Federal Employment Agency on Saint Croix. He also applied by telephone for two jobs, telemarketer and caretaker for disturbed children, presented by the Employer's rehabilitation counselor. Mr. Conner has not had any job interviews. He has been treated in several VA facilities including Saint Croix (March 1999), Puerto Rico (May 1999), Alexandria, Louisiana (July 1999) and North Carolina. Since June 1998, Mr. Conner had surgery on his left elbow.

On February 17, 2000, again through counsel, Mr. Conner updated his replies. At that time, while living in Louisiana, Mr. Conner had inquired about work with one company, Procter and Gamble, and had applied for a position with a power company. Mr. Conner had also registered with the Louisiana state employment agency. He continued to receive treatment and medication from the VA hospital in Alexandria, Louisiana. Mr. Conner also had injured his left elbow when his legs gave out and he fell. After a treatment, the elbow became infected so eventually Mr. Conner went to the VA hospitals in Puerto Rico and Louisiana for additional care. In October 1999, at the Louisiana VA hospital, Mr. Conner underwent surgery for his elbow problem. Mr. Conner indicated that lived in Saint Croix with his brother because he had no money. He stayed with his girlfriend in Alexandria, Louisiana to look for employment and receive medical care for his elbow.

Surveillance Videotapes
(EX 5)

The first videotape records some of Mr. Conner's non-strenuous activities on February 22, 1999, from 9:58 a.m. to 4:41 p.m. The second videotape, recorded April 21, between 8:25 a.m. and 4:37 p.m. and April 22, 1999, from 9:17 a.m to 4:10 p.m., shows Mr. Conner at various times during the two days engaged in activities not involving extensive effort.

Correspondence
(EX 6 and EX 7)

On February 11, 2000, Mr. Grossman indicated Mr. Conner was living in Boyce, Louisiana and requested approval for medical treatment by Dr. Katz.

On February 18, 2000, Mr. Grossman informed counsel for the Employer that due to financial difficulties, Mr. Conner was leaving the United States and going to Saint Thomas. He requested approval of medical care by a physician in Saint Thomas.

Sworn Testimony Presented by the Claimant

Mr. David L. Conner
(TR, pages 122 to 197)

[Direct Examination] Mr. Conner is 52 years old and presently resides in Charlotte, North Carolina in a house owned by his brother. He owns a 34 foot sailboat that is registered in North Carolina. The boat has an autopilot, GPS system, and a roller-furling gib that permits Mr. Conner to sail by himself. While he worked at AUTEC, the sailboat was his main residence. He moored the boat off shore because it was cheaper.

He sought employment with AUTEC because he was having difficulty finding a job in the mainland, had enjoyed living in the Keys, and had previously visited Andros Island in the Bahamas. He had to apply in West Palm Beach for the job and gave the company a Charlotte, North Carolina mailing address. Mr. Conner chose Jensen Beach to live on his sailboat during his medical treatment because the anchorage was free and he had easy access to a phone in an apartment owned by a mother of one of his friends. He did receive some mail in care of the friend's mother, but he never considered Jensen Beach his residence. Mr. Conner came to Florida after his accident for physical therapy treatment. He first saw a physician in either West Palm Beach or Fort Lauderdale, but eventually chose Dr. Krost because he was closer to Mr. Conner's location. After Judge Guill's hearing in June 1998, conducted in Fort Lauderdale, Mr. Conner stayed at Jensen Beach until November 1998 while he continued to receive therapy. He never seriously considered living in Jensen Beach.

For about a month between November 1998 and December 1998, Mr. Conner visited his daughter in Alexandria, Louisiana. He then moved to Saint Croix and initially stayed with his brother in a condo. Mr. Conner's brother had indicated that Hess Oil on the island was expanding their power plant operation and there might be employment opportunities. Mr. Conner had some power plant experience from his work in Key West. Within a few days, he applied for three environmental positions with Hess, which is really the island's total economy. He continued telephonic contact with the company for several weeks. He also applied at the local employment service. However, he eventually was informed the positions had been filled. During his stay on the island, Mr. Conner suffered an elbow injury when his fell. He received some treatment on the island, but the elbow became infected so he traveled to Puerto Rico to get assistance at the VA hospital. Then, Mr. Conner returned to Alexandria, Louisiana in June 1999.

In Louisiana, Mr. Conner stayed with his fiancé's mother and received medical treatment at the VA hospital. While in Louisiana, Mr. Conner looked for employment through the state employment agency. He made weekly checks of the postings of current job openings. He applied for a position with the local power company as a lab technician in their environmental department. He met several times with the person in charge of the hiring; eventually, he discovered the company wasn't ready to hire anyone. Another power company had a hiring freeze and Proctor and Gamble, a major employer, was not accepting applications. He eventually stayed in an apartment through April 2000. Then, based on another job tip from his brother, who was now in Saint Thomas, Mr. Conner departed Louisiana for North Carolina to stay in his brother's house for a while. Mr. Conner intends to go to Saint Thomas.

In May 1999, while still residing in Saint Croix, Mr. Conner received the Employer's 1999 labor market survey. He was surprised because his compensation checks had been coming to Saint Croix but the labor market survey covered West Palm Beach. He called the first five employers on the list but stopped because he didn't want to live in West Palm Beach.

Just about a month prior to the present hearing (May 2000), Mr. Conner went to Key West and talked with a former supervisor in Key West about a potential job. He learned the company was hiring within. He has also returned to see Dr. Krost two times since leaving the state in the fall of 1998.

Physically, Mr. Conner has good and bad days. On the good days, he feels normal. On the bad days, he has muscle spasms and spends most of the day on his back. He takes muscle relaxer medication every day.

[Cross Examination] When he is having a bad day, Mr. Conner is not capable of operating his sailboat. He does not consider diving off his sailboat (as depicted on videotape) to involve a significant amount of exertion. Likewise, operating the dinghy doesn't require a lot of effort. In January 1999, he made a six day passage from Long Key to Saint Croix without a crew.

Having lived on the boat for five years, Mr. Conner used his brother's mailing address in Charlotte, North Carolina as his legal residence. He was in the Bahamas when he learned about the job opportunity at AUTEC. So, he returned to the United States to make the job application for the AUTEC position since he couldn't apply while in the Bahamas. He moored his boat in Charleston, South Carolina and stayed there for about six months. He received mail in Charleston, at a marina, and in North Carolina.

He worked for AUTEC for about four and a half months on Andros Island and lived on his sail boat most of the time. He received some of his mail on the island. His mail also continued to go to North Carolina. From June 1998 through November 1998, Mr. Conner stayed in Jensen Beach, Florida with his boat anchored just off the Jensen Causeway. In addition to seeing Dr. Krost, Mr. Conner made trips to the VA hospital in West Palm Beach. Dr. Krost had previously provided physical and electrical therapy for Mr. Conner. But, during the four month period after the June 1998 hearing, Dr. Krost just prescribed medication after an examination. He did not provide any additional therapy. Mr. Conner didn't see Dr. Krost on a monthly basis; instead, he returned to the doctor when he was experiencing pain.

Because Mr. Conner was using food stamps, about $102 a month, he did several job searches a day for "two years." According to Mr. Conner, he "applied for jobs in about every walk of life. . .when you apply for five jobs or three jobs a week for . . . two years, a year and a half, [y]ou apply for a lot of jobs." Mr. Conner continued his job searches after the June 1998 hearing. He did not follow-up with any of the jobs Judge Guill had approved. Mr. Conner believes he received job leads for the Florida employment service. He can't recall the specifics, but he was "naturally" looking for "something in [his] background," which his water chemistry and environmental. Because Mr. Conner can not work in an industrial setting, he'd like "to do lab work or something." He doesn't remember whether he looked for

any lab work during June to November 1998. Mr. Conner acknowledges there are many jobs he can do but he "can't seem to find somebody that can hire" him. He mailed out resumes, and nothing happened. He spoke to one un-named head of an county environmental department but was not hired. He did not get any calls or interviews for employment. He would not have turned down a job offer in Florida if he had received one. He also would not have refused a job offer outside his career area.

When Mr. Conner went to Louisiana in November 1998, he did not look for work because he was just going to visit his children and he knew that after Christmas he'd be going to Saint Croix. He stayed about a month. Then, from December 19, 1998 through January 25, 1999, Mr. Conner traveled and sailed. He arrived in Saint Croix on the 25th of January. Within one week, he applied for work at Hess Oil. He applied at the local employment agency and also "schmoozed around, talking to people." Eventually, he received four job leads in the environmental area and he applied through the agency office. He checked in with the agency weekly. He didn't get the jobs because they had hired someone else. Mr. Conner unsuccessfully attempted to get a job application from an aluminum company and a water-production plant. Then, he tried the yacht club's sailing school, but they were concerned about his bad back. By May 1999, Mr. Conner decided he should return to the United States and left in June 1999. On the way, Mr. Conner stopped in Puerto Rico for treatment of his elbow. By July 1999, Mr. Conner had returned to Alexandria, Louisiana, home to his daughter and fiancé. During this period, he contacted several employers, including a power plant operator. Mr. Conner lived in Louisiana through February 2000 and received treatment at the VA hospital. Mr. Conner's disability compensation checks went to his brother in Saint Croix for placement in a joint checking account. He didn't advise the Employer or the Insurer that he was living in Louisiana. He left Louisiana for good at the end of April 2000. At the time of the hearing (May 2000), Mr. Conner was back in Charlotte, North Carolina but intended to move to Saint Thomas. He looked in the Charlotte newspaper for suitable work but didn't find anything. He has also recently checked job listings in the Florida keys because he has lived there a total of 15 years and has friends in that area. If a job had been available there, he would have taken it.

When Mr. Conner confirmed that he hadn't had a single job interview since June 1998, he stated, "It's amazing, isn't it?" Mr. Conner does not want to live in West Palm Beach. Other than the initial five phone calls, Mr. Conner has not contacted anyone else on the 1999 labor market survey. He has not contacted any employer listed in the 2000 labor market survey. Mr. Conner plans on returning to work since he is only making $1,000 a month. While remaining capable of work, Mr. Conner tried to find employment work over the last two years but has not be able to find any work.

[Direct Examination - ALJ] After Mr. Conner suffered his back injury at work, he received some treatment on Andros Island for about ten days. Then, the physician recommend he return to the United States and AUTEC flew him to West Palm Beach to see a medical specialist. AUTEC has a plane stationed in West Palm Beach. The physician treated him for about a month. He also traveled to Naples, Florida to see a surgeon about another back problem. Mr. Conner then returned to West Palm Beach. When his AUTEC labor contract ended March 31, 1997, he was laid off. His berth at Jensen Beach was

inexpensive, he had logistical support from his friend's mother and he was relatively close to the Bahamas. Since the doctors were there, he felt his only choice was to stay at Jensen Beach.

Documentary Evidence Presented by the Claimant

Deposition - Dr. Stuart B. Krost
June 4, 1998 (CX 1)[6]

In his deposition, Dr. Krost, board certified in physical medicine and rehabilitation (EX 2), discussed his treatment of Mr. Conner from August 21, 1997 through April 30, 1998 for low back pain due to a February 1997 work-related injury. According to Mr. Conner's medical record, he received treatment from Dr. Waeltz from February 25, 1997 through May 9, 1997. Through October 1997, Dr. Krost prescribed physical therapy that appeared to provide some pain relief. Since Mr. Conner reached a plateau at that point, he stopped the formal physical therapy and had Mr. Conner continue a home exercise program. Following the last visit, Dr. Waeltz concluded Mr. Conner had reached maximum medical improvement and placed him on light duty status.

Dr. Krost annotated on March 1998 that Mr. Conner was still engaged in his job search for sedentary work. At the same visit, he advised Mr. Conner to return as needed for pain. Based on an April 30, 1998 contact that did not involve an office visit, Dr. Krost prescribed an epidural injection for pain relief.

Deposition - Dr. Stuart B. Krost
April 17, 2000 (CX 2)

From July 1998 through October 21, 1998, Dr. Krost continued to see Mr. Conner for renewal of his medication for back pain. During that period, Mr. Conner's physical condition and the associated work limitations did not change. When Dr. Krost again saw Mr. Conner on April 5, 2000, his condition remained unchanged and he was still taking medication for his back. Likewise, the work restrictions were unchanged. Dr. Krost reviewed a number of job descriptions and employment opportunities and found most of the positions fit within Mr. Conner's physical limitations. At the same time, considering the duration of his ailment and his varying intensity, Mr. Conner might have problems with a full time job.

An August 19, 1999 treatment note attached to the deposition indicates Mr. Conner reported to Dr. Krost he was still looking for work and intended to move to Louisiana permanently. Mr. Conner had also just received surgical treatment for an elbow injury.

[6]This deposition was taken prior to the June 26, 1998 hearing with Judge Guill and was admitted as CX 51 in that proceeding.

Investigation Invoices
February 1999 and April 2000 (CX 3)

The insurer paid an investigative firm in Saint Croix about $5,100 to conduct surveillance of Mr. Conner in February of 1999. Again, in April 1999, the Insurer paid about $3,500 for additional surveillance. The last bill documents about $1,400 worth of surveillance in April 2000.

Sworn Testimony of Mr. David L. Conner
June 26, 1998 hearing before Judge Guill, transcript, pages 44 to 119

At the time of the hearing, Mr. Conner's legal address was in Charlotte, North Carolina but he "lived on a sail boat in the intracostal waterway." When queried about the physical demands associated with sailing his 34 foot long sail boat, Mr. Conner stated, "due to wind, pressure can increase to where it becomes difficult." In answer to the question of whether he has been able to sail his boat, Mr. Conner replied, "not since this happened."

Mr. Conner obtained his biology degree in 1982 and after a brief initial employment in the United States, he moved to Saudi Arabia to work for one year, where he supervised up to 22 employees. After returning from overseas, Mr. Conner moved to Key West in about 1984. He started out in construction, became a field biologist and eventually work for the local power company. While employed at the power company, Mr. Conner injured his neck and eventually had neck surgery to fuse a cervical disc. He continued with the power company until May 1995.

Shortly after leaving the power company, Mr. Conner left Key West and sailed the Caribbean for a year and a half. During one of his voyages in April or May of 1996, he visited Andros Island in the Bahamas and discovered the AUTEC range operation. Because he could not apply for work on the island while still in the Bahamas, Mr. Conner went to West Palm Beach to apply with AUTEC for an environmental position. In August 1996, he flew to Andros Island for an interview with AUTEC personnel. Then, he sailed to Charleston, South Carolina. Since he did not have a requisite license, Mr. Conner could not secure the environmental position with AUTEC. In December 1996, he did accept a position as a warehouse clerk with AUTEC.

Following his back injury in February 1997, Mr. Conner received medical treatment and therapy from Dr. Waeltz in West Palm Beach, Florida through May 1997. In the first part of June 1998, after the completion of his treatment with Dr. Waeltz, he returned to Andros Island and his sailboat, which was anchored in a creek. In Mr. Conner's words, "the sailboat is where I live." The sail boat was his home on the island. Since the AUTEC contract for its operation on the island had expired as of March 31, 1997, he attempted to obtain light duty work with the successor contractor, Raytheon, but no positions were available.

In August 1997, Dr. Krost began treating Mr. Conner and put him through another course of physical therapy. In October 1997, Mr. Conner "finished with Dr. Krost." He only returned to Dr. Krost periodically for medication.

Mr. Conner signed up with the Florida employment office in Stuart, Florida. He looked for professional and other types of work. He didn't want to work in West Palm Beach since it was an hour drive from his location in Jensen Beach. Mr. Conner called all the employers on the labor market survey. None of the employers had a job available at the time of his call just before the hearing. Over the course of 16 months, Mr. Conner had been unable to secure any job interview. He has also looked for work in Martin County.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

The parties stipulated to, and I find, the following facts: a) on February 13, 1997, Mr. Conner suffered an injury that arose out of, and during the course of, his employment with the Employer; b) all the appropriate notices, including the notices of claim, injury and controversion were timely filed; c) the average weekly wage at the time of injury was $356.29; d) the present weekly compensation rate is $248.00; e) Mr. Conner reached maximum medical improvement on April 30, 1998; f) due to his injury, Mr. Conner is unable to perform his prior employment or job with the Employer; g) since 1998 through the date of the hearing, May 10, 2000, suitable alternative employment existed in the West Palm Beach area; and, h) some of the suitable employment offered salaries at least equal to the average weekly wage (TR, pages 9, 10, 12, 19, and 76 to 78).

Modification

Under Section 22 of the Act, 33 U.S.C. § 922, any party in interest may request modification of a compensation order due a mistake of fact or a change in conditions.[7] 33 U.S.C. § 922. The central purpose of this provision is to render justice under the Act by giving the trier of fact wide discretion to modify a compensation order by considering newly submitted evidence or to further reflect on the evidence initially submitted. *Finch v. Newport News Shipbuilding & Dry Dock, Co.*, 22 BRBS 196 (1989), *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971), and *Hudson v. Southwestern Barge Fleet Servs.*, 16 BRBS 367 (1984). At the same time, Section 22 is not intended to be a back door for retrying or litigating issues. *Delay v. Jones Washington Stevedoring Co.* 31 BRBS 197 (1998). The party requesting the modification has the burden of proof. *Vasquez v. Continental Maritime*, 23 BRBS 428 (1990).

[7]The parties did not dispute the timeliness of the employer's modification request.

Even though the Employer in this case is asserting a change in conditions, I have initially considered whether a mistake of fact was made in the original adjudication. I find the record developed since Judge Guill's March 1999 Decision and Order insufficient to impeach his findings of fact and modify his compensation order based on a mistake of fact.

Turning to the change of conditions basis for modifying Judge Guill's decision, a review of Judge Guill's compensation order is necessary to establish a baseline from which to consider whether Mr. Conner has experience a change in conditions since the June 1998 hearing.

Decision and Order of Administrative Law Judge James Guill, 1998-LHC-973,
March 23, 1999 (EX 1)[8]

In working through the total disability adjudicatory process, Judge Guill first found, based on Dr. Krost's well reasoned and probative medical opinion, that Mr. Conner reached maximum medical improvement on April 30, 1998. Then, he determined Mr. Conner had established a *prima facie* case of total disability because, based on the consensus of the medical experts, he could not return to his pre-injury job which required occasional heavy lifting. Moving to the next step in the process, Judge Guill concluded Mr. Conner has a residual capacity to work and the requisite willingness to work. Judge Guill observed that a two-hour videotape showed Mr. Conner engaged in daily activities that fit within his physical limitations. The Employer also had presented sufficient evidence of at least 14 jobs within a 60 mile commuting area, which Judge Guill considered was the local community.[9] These jobs involved light duty with twisting and ten pound lifting limitations and received medical approval.

Having concluded that the Employer had established evidence of suitable alternative employment, Judge Guill next considered whether Mr. Conner had made a good faith effort to find employment. Based on Mr. Conner's credible testimony indicating he had contacted all the employers on the labor market survey and none were hiring, and Mr. Conner's job search log, Judge Guill concluded Mr. Conner had made a diligent search for employment but was unable to secure a job. As a result, Mr. Conner rebutted the Employer's presentation of suitable alternative employment and was totally disabled as of May 1, 1998.

Judge Guill then addressed the issue of average weekly wage. Using Section 10 (c) of the Act, 33 U.S.C. §910 (c), he fixed the average weekly wage as $356.29, by averaging Mr. Conner's income from 1991 through 1996.

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[8]The actual effective date of Judge Guill's decision was April 5, 1999, the date the District Director formally served the decision on the parties.

[9]Judge Guill rejected Mr. Conner's position that he could drive no more than 30 minutes. Judge Guill also observed other means of transportation were readily available in the local area.

Next, Judge Guill found Mr. Conner entitled to reimbursement for past medical treatment and payment of future medical treatment that was reasonable and necessary.

Finally, Judge Guill denied the Employer's request for Section 8 (f), 33 U.S.C. § 908 (f), relief based on Mr. Conner's prior injuries. The Employer's failure to establish that either of the prior injuries contributed in anyway to his current total disability served as the basis for the denial. Based on his findings, Judge Guill ordered AUTEC and its insurer to pay Mr. Conner temporary total disability from February 12, 1997 through April 30, 1998 based on an average weekly wage of $356.29. Starting May 1, 1998, the Employer was required to pay Mr. Conner permanent total disability compensation.

Issue No. 1 - Change in Condition

If a party is not able to show a mistake of fact in a compensation order, he or she may still be able to modify a compensation order if there has been a change in physical or economic conditions. *Rizzi v. Four Boro Contracting Corp.*, 1 BRBS 130 (1974). However, it is important to note that the change in condition relates solely to injury which has been found to be caused by the work-place accident. In other words, unless there is an established mistake of fact, a party is not allowed to re-litigate the issue of casual relationship on the motion for modification based on change in conditions. *Leech v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977).

In the case before me, the alleged change in condition relates to the extent of Mr. Conner's efforts to secure employment after his hearing with Judge Guill in June 1998. Judge Guill determined Mr. Conner's diligent, but unsuccessful, search for work with the employers listed in the labor market survey, coupled with his job search log, established his inability to work. Therefore, Mr. Conner had met his burden of proof and was entitled to total disability compensation. The Employer believes a change has occurred because since Judge Guill's June 1998 hearing Mr. Conner has not diligently looked for work in the West Palm Beach area. Mr. Conner responds that his re-employment efforts in various locations have been futile. Imbedded in the parties' representations is the pivotal issue in this case - whether West Palm Beach, Florida is the relevant community for Mr. Conner's job search efforts.

A. Relevant Community for Determination of Suitable Alternative Employment.

Once a claimant establishes a *prima facie* case of total disability[10] by demonstrating that he is

[10]The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128,131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (DC Cir. 1988).

incapable of returning to his regular employment due to work-related injuries,[11] an employer has the burden of production to show that suitable alternative employment is available.[12] The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his or her age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community.[13]

The central dispute in this case involves the determination of that local community. The Employer asserts the West Palm Beach area is the proper "local community" for purposes of demonstrating suitable alternative employment. And, since the parties have stipulated that suitable alternative employment has existed in the West Palm Beach area since 1998, AUTEC maintains its burden of production has been met. Correspondingly, in light of Mr. Conner's failure to pursue work opportunities in the West Palm Beach area, his compensation for total disability is no longer warranted.

Mr. Conners disagrees. Asserting his stay in West Palm Beach, Florida was only temporary, Mr. Conner beliefs his legitimate moves to Saint Croix, Alexandria, Louisiana, and Charlotte, North Carolina have established those three areas as the "relevant community" for the determination of suitable alternative employment. Since the Employer has not presented evidence of suitable alternative employment in Saint Croix, Alexandria, Louisiana, and Charlotte, North Carolina, it has not meet its burden of production and Mr. Conner's entitlement to compensation for total disability remains unchanged.

In the course of explaining the definition of "local community" over several years, the Benefits Review Board ("BRB" and "Board") and courts have refined their analysis of the issue. Initially, the BRB generally used the location or "vicinity" where the injury occurred or where the claimant resided at the time of the injury. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979).[14] In cases where the claimant had moved since the injury and the record lacked any evidence of an economic purpose for the move or the claimant moved for personal reasons, the Board generally still continued to use the place of injury as the relevant labor market area. *Elliott v. C&P Tel.* Co., 16 BRBS 89, 92 (1984), *Nguyen v. Ebbtide Fabricators, Inc.* 19 BRBS 142, 145 (1986) and *McCullough v. Marathon LeTourneau Compan*y, 22 BRBS 359, 365 (1989). In one case, even when there was an implicit economic reason for the post-injury move (expiration of the claimant's one year work contract), the Board still held the location of the

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[11]*McBride*, 844 F. 2d at 798

[12]*Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

[13]*Newport News Shipbuilding and Dry Dock Co. v. Director*, OWCP, 592 F.2d 762, 765 (4th Cir. 1978) and New *Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

[14]In some cases, the BRB has used the language that the relevant community is the location where the claimant resides. However, my review of those cases indicates, the claimant did not move after the injury so that the place of residence and the site of the injury were the same. *See Black v. Ceres Inc.*, 19 BRBS 219, 221 (1986).

injury rather than the claimant's residence was the appropriate job market. *Dixon v. John J. McMullen and Assocs.*, 19 BRBS 243 (1986). The Board was not always very concise in its explanations. For example, in the situation involving a claimant who, having been previously injured to the extent he was unable to return to his former job, was laid off by the employer from his light duty job and subsequently moved 120 miles away because he could no longer afford to live at the original location, the Board observed the employer had failed to demonstrate suitable alternative employment in either the place of injury or place of residence. By implication, rather than explanation, either location was the relevant labor market. *Vasquez v. Continental Maritime,* 23 BRBS 428, 430 (1990).

Eventually, when the federal courts addressed the issue of the relevant labor market for a re-located claimant, they developed a balancing test based on the specific facts of the individual case.[15] In *See v. Washington Metropolitan Area Transit Authority,* 36 F.3d 375 (4th Cir. 1994), the court rejected the inflexible rule that the location of the injury becomes the location for the suitable alternative employment analysis. Instead, observing that the determination of the relevant labor market should reflect the Act's emphasis on the economic consequences of a job-related injury, the court held the focus of the availability of employment should generally be on the job market where the claimant presently lives rather than where he or she resided at the time of the injury provided the move was motivated by a legitimate purpose. A relocation conducted in an effort to reduce living expenses is such a legitimate purpose since the action helps mitigate the economic consequences of the claimant's impairment. *Id* at 381 to 383.

At the same time, the court noted at least three possible exceptions to its general rule. First, a claimant should not be able to dictate the success of his or her claim by relocating to an area so economically depressed that it contained "virtually unavailable" job opportunities. Second, an employer should not be subjected to evidentiary burden of showing suitable alternative employment in a location chosen by the claimant that is "so geographically distant that the employer is unable, without extreme hardship, to obtain a reliable labor market survey. And, third, the employer should not be exposed to the evidentiary hardship of showing suitable alternative employment in the location of the claimant's residence when the claimant is "excessively transient after the injury." In other words, the claimant's constant movement and relocation would not allow an employer to do a valid labor market survey. *Id* at 382 and 383.

In balancing its general rule with the three notable exceptions, the court concluded an administrative law judge in determining the relevant labor market must consider such factors as:

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[15]I have reviewed the cases cited by Claimant's counsel, *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031 (5th Cir. 1981) and *Haughton Elevator Co. v. Lewis*, 572 F. 2d 447 (4th Cir. 1978), which indicate the geographic area where a claimant presently lives is the appropriate labor market. However, in those cases, the claimant did not move after his injury. In addition, the United States Court of Appeals for the Fourth Circuit later addressed in the *See* case the situation presented in Mr. Conner's case.

> the claimant's residence at the time of his filing for disability benefits, his motivation for relocation after the accident, the legitimacy of that motivation, the duration of his stay in that new community, his ties to that new community, the availability of suitable job opportunities in the new community as opposed to those in his former residence, and the degree of undue prejudice to the employer in proving suitable alternative employment in the claimant's new community. *Id* at 383.

In *Wood v. U.S. Department of Labor*, 112 F. 3d 592 (1st Cir. 1997), a different court addressed the same problem concerning the appropriate labor market when an employee moves to a new community after the injury.[16] Noting the analysis in *See*, the court believed a claimant's choice of community is presumptively the proper labor market. According to the court, an employer may overcome that presumption by showing either the claimant's move was unjustified and unreasonable in economic terms or the employer will be prejudiced by the extreme disparity in wage earning opportunities between the two locations. In its discussion, the court concluded that a purely personal reason for a move, such as caring for an aged parent, did not amount to an economic justification. *Id.* at 593 to 598.

Apparently due to the federal courts' analytical model, the BRB, in *Wilson v. Crowley Maritime*, 30 BRBS 199, 203 (1996) became more focused and used the approach set out in the *See* case. Interestingly, in the *Wilson* case, the Board characterized a stay of sixteen months in one location by a claimant as establishing "limited" ties compared to his hometown residence.

In summary, both the courts and BRB now required a considered analysis of multiple factors in determining the appropriate labor market for the determination of suitable alternative employment. A claimant's choice of residence is given preference over the place of injury provided his or her re-location was based on legitimate economic reasons and the claimant has ties to the new community. However, on balance, the claimant's choice of residence may be overcome if the employer suffers undue prejudice. The detriment to the employer may involve the difficulty associated with preparing a labor market survey in a distant location or the enhanced hardship of establishing suitable alternative employment when the claimant chooses a more economically depressed area for his or her residence. In addition, undue prejudice to the employer may occur when the transient nature of the claimant's relocations increases the evidentiary difficulty with establishing suitable alternative employment in multiple locations.

I also note that the issue before me is not the typical place of injury versus place of residence dispute. Neither party asserts that Andros Island, Bahamas, the location of Mr. Conner's work-related injury, is the relevant community for a labor market survey. I agree. Mr. Conner's principal motivation for moving to Andros Island was his desire to work in the lower latitudes. He resided on the island only a few months prior to his February 13, 1997 injury while working for AUTEC. Following his accident,

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[16]The issue in this case involved the determination of residual earning capacity in relation to a partial disability rather than a total disability award.

his work opportunities were severely limited for two reasons. First, AUTEC's contract for range operations with the government expired at the end of March 1997, so his term contract with AUTEC terminated and he was not able to return to work for the employer. Second, since Mr. Conner was in the Bahamas on a work visa, the only other apparent alternative employer was the successor contractor for the range operation. For a brief period in April 1997, after receiving medical treatment in West Palm Beach, Mr. Conner did return to Andros Island to look for work with the successor contractor, but he did not qualify for any position. Absent any viable work opportunity, Mr. Conner departed Andros Island for a legitimate economic reason.

Since Andros Island, the location of Mr. Conner's work-related injury, is not the relevant community for the purposes of establishing suitable alternative employment, I must now consider the factors laid out in *See* and the analytical approach established by *Wood* to determine which of the multiple locations where Mr. Conner has lived, or intends to live, since the June 1998 hearing with Judge Guill is the appropriate labor market community.

Saint Croix, Virgin Island. Based on a job lead from his brother, Mr. Conner arrived in Saint Croix, U.S. Virgin Islands, on January 25, 1999 after spending a month visiting his daughter in Alexandria, Louisiana and then sailing in the Caribbean for a while. As Mr. Conner acknowledged, the job opportunities were limited on Saint Croix because Hess Oil represented most of the island's economy. He spent the next couple of months living with brother and on his sail boat. Besides unsuccessfully seeking employment with Hess Oil, he periodically looked for other type of work on the island.

Taking Mr. Conner's testimony about a job opportunity with Hess Oil at face value, his move to the island was based on a legitimate economic reason. However, though he had a family tie, through his brother, to the island, he actually lived on the island only a few months; an insufficient amount of time to form other significant ties to the local community.

Considering prejudice to the Employer, the remote location of Saint Croix was not necessarily a hardship since Mr. Steckler conducted his labor market surveys through telecommunications means - over the telephone and internet. Due to his method for conducting labor market surveys, Mr. Steckler would have no apparent greater difficulty preparing a labor market survey for the U.S. Virgin Islands than he did for the West Palm Beach area. On the other hand, the employer did experience significant prejudice in its ability to show suitable alternative employment because, in comparison to West Palm Beach, Florida, Saint Croix had very restricted job opportunities since Hess Oil was the only principal employer on the island.

On balance, I find the deference to be given to Mr. Conner's choice of Saint Croix as his residence is outweighed by his limited ties to the island's community, coupled with the substantial prejudice to the Employer associated with the limited job opportunities on the island. As a result, Saint Croix, U.S. Virgin Islands, is not a relevant community for the purposes of demonstrating suitable alternative employment.

Alexandria, Louisiana. When Mr. Conner was unable to obtain employment in Saint Croix, he moved to the Alexandria Louisiana area in June 1999. As demonstrated by his one month visit in December 1998, Mr. Conner had a family tie, through his daughter, to the area. Alexandria, Louisiana also provided a link with his fiancé. He initially stayed with in his fiancé's mother and then moved into an apartment and lived with his girlfriend. While in Louisiana, he received medical treatment at the VA hospital and looked for employment. Again, unsuccessful with his job search, Mr. Conner left Louisiana in April 2000. In anticipation of going to Saint Thomas, where his brother now resided, to look for work, Mr. Conner moved to Charlotte North Carolina to temporarily live in his brother's house.

While Mr. Conner left Saint Croix due to economic reasons, his choice of Alexandria, Louisiana as his new residence appears to favor more personal, rather than economic, reasons. Mr. Conner was able to reduce his living expenses for a while by living with his potential mother-in-law; but, the principal draw to the area appears to be the location of his girlfriend and the proximity of his daughter. In addition, since VA hospitals are located throughout the United States and Mr. Conner had in fact received medical care at other VA facilities, such as the hospital in Puerto Rico, his use of the VA hospital in Alexandria, Louisiana does not represent a significant reason to defer to his choice of that community. Finally, arriving Alexandria, Louisiana in June 1999, less than a year since his hearing with Judge Guill, Mr. Conner stayed in the area less than ten months. Although the duration of his stay was over double the amount of time he resided in Saint Croix, Mr. Conner still lived in the Alexandria, Louisiana area an insufficient amount of time to show significant and enduring ties to the location.

Turning to the effects of his residency choice on the Employer, absent any employment data from Alexandria, Louisiana, I am unable to find prejudice to the Employer in regards to a suppressed job market. Likewise, Mr. Steckler could also have easily conducted a labor market survey of the Louisiana area instead of West Palm Beach. However, the Employer did face an increased evidentiary burden since Mr. Conner's move to Louisiana represented his third residence in the one year since Judge Guill's June 1998 hearing. Additionally, the Employer's evidentiary burden was nearly insurmountable because Mr. Conner did not even inform the Employer that he had moved to Louisiana. The Employer had no notice of the move since Mr. Conner chose to have the Employer's disability compensation checks continue to go to a joint account in Saint Croix.

Considering Mr. Conner's principally personal motives for selecting Alexandria, Louisiana as his new residence, his relatively short stay in the area, the evidentiary burden to the Employer of having to develop a several labor market surveys for multiple locations in less than a year due to his transient nature, and the very real evidentiary burden of developing a labor market survey for Alexandria, Louisiana in the absence of notice from Mr. Conner of his move to that community, I find Mr. Conner's choice of Alexandria, Louisiana as his residence should not accorded preference. Consequently, Alexandria, Louisiana is not the relevant community for determining suitable alternative employment.

Charlotte, North Carolina. Although Mr. Conner's motive for choosing Charlotte, North Carolina

as his residence in May 2000 is not clear, he was apparently able to reduce living expenses by staying in his brother's house. In addition, Mr. Conner had other ties to the Charlotte, North Carolina area. His sailboat is registered in North Carolina. And, due to his nautical nomad lifestyle, Mr. Conner utilized his brother's house in Charlotte as his legal mailing addresses.[17] For example, Mr. Conner used his brother's mailing address when he applied in West Palm Beach for a position with AUTEC even though he lived on his sail boat in Charleston, South Carolina while waiting for AUTEC's reply. On the other hand, Mr. Conner has stated he intends to remain in Charlotte for only a short period of time because he is planning to move to Saint Thomas, U.S. Virgin Islands, in the near future to look for employment.

Mr. Conner's temporary move to North Carolina further illustrates the transient nature of his residency choices and the significant burden presented to the Employer in following Mr. Conner from place to place to establish suitable alternative employment. In other words, by the time the Employer completes a labor market survey of Charlotte, North Carolina, Mr. Conner may have moved back to the U.S. Virgin Islands.

Due to his stated temporary stay in North Carolina, Mr. Conner has insufficient, permanent ties to that area to warrant giving his choice of that area preference. At the same time, the Employer faces a significant evidentiary burden in being required to develop a fourth labor market survey since Judge Guill's June 1998 hearing. Considering all the factors associated with Mr. Conner's selection of Charlotte, North Carolina as his residence, I find it is not the relevant labor market community.

Saint Thomas, Virgin Islands. Pursuing yet another potential job opportunity through his brother, Mr. Conner was again on the move in the spring of 2000 heading for Saint Thomas, where his brother now resided. At my May 2000 hearing, Mr. Conner stated his intention of moving to Saint Thomas.

Since Mr. Conner has yet to move to Saint Thomas, it is clearly unsuitable as relevant community in this case. Yet, his stated intention to move back to the Virgin Islands further establishes the transient nature of Mr. Conner's residences and casts a personal hue on his choice of living locations which favors the sun and waters of the U.S. Virgin Islands. His intention to move again also highlights the evidentiary difficulties presented to the Employer in determining which of Mr. Conner's choices of living locations should control as the appropriate relevant community for establishment of suitable alternative employment.

West Palm Beach, Florida. Initially, in late February 1997, shortly after his injury, Mr. Conner found himself in the West Palm Beach area because the employer flew him there on a company aircraft for medical treatment with Dr. Waeltz. However, once his treatment was completed, Mr. Conner left West Palm Beach and returned to Andros Island for about a month in April 1997. Then, Mr. Conner decided

[17]An interesting, but unanswered question, is which location Mr. Conner declares as his domicile for state tax purposes.

to return to the West Palm Beach area and berth at Jensen Beach in May of 1997.[18] Over the course of the next 18 month, he established medical, legal, personal, and economic ties with the local community. Mr. Conner initiated his own medical treatment with Dr. Krost and remained in the physician's care, obtaining prescriptions, through his departure in November 1998. While residing in the West Palm Beach area, Mr. Conner initiated the legal proceedings in this case by filing his claim for benefits. Even at the time of the June 1998 hearing before Judge Guill, Mr. Conner still lived on his boat in the causeway slip near Jensen Beach. Mr. Conner also had a personal tie to the community via the mother of a friend. Finally, in economic terms, the West Palm Beach area provided some relief because Mr. Conner was able to berth his boat in a causeway at minimal expense; and, through his friend's mother, he had access to an apartment for logistical support, including use of a telephone and receipt of mail, without the typical expenses associated with living in an apartment.

Concerning the West Palm Beach area as his residence, Mr. Conner stated he had no choice because his medical care was in West Palm Beach. Granted, initially, Mr. Conner had little selection over his place of residence because AUTEC flew him to West Palm Beach for treatment by Dr. Waeltz. But, at the completion of Dr. Waeltz' treatment, Mr. Conner went back to Andros Island for a month. His subsequent return to West Palm Beach did not involve the Employer. Notably, although Mr. Conner professed that he never wanted to live in the West Palm Beach area and didn't seriously consider staying at Jensen Beach, Mr. Conner decided to live in that community when he departed Andros Island for the last time in April 1997. Mr. Conner picked a community where he could dock inexpensively, have access to an apartment, and receive medical treatment from a physician he selected, Dr. Krost. Rather than being involuntary, the circumstantial evidence indicates Mr. Conner returned to West Palm Beach on his own accord for economic and medical reasons. Likewise, once he initiated his disability compensation claim, he had a legal reason for remaining in the area.

I have considered Mr. Conner's description to Judge Guill of his lack of success at obtaining work in and around West Palm Beach, Florida, and his testimony before me that he departed the area based on economic necessity for a job opportunity in Saint Croix. However, the parties have stipulated that suitable alternative employment was available in the West Palm Beach area after Judge Guill's hearing. Apparently, rather than continue to look for work in the area, Mr. Conner decided to pull up anchor at Jensen Beach four months after the hearing, spend a couple of months traveling to Saint Croix via Alexandria, Louisiana and the Carribean, and then start his job search in earnest upon arrival in Saint Croix. The circumstances of his move, particularly his leisurely trip to Saint Croix, seem to diminish the stated economic necessity of Mr. Conner's departure from West Palm Beach.

Ultimately, after finding that Saint Croix, U.S. Virgin Islands, Alexandria, Louisiana, Charlotte, North Carolina, and Saint Thomas, U.S. Virgin Islands are not the appropriate relevant communities for

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[18]I take judicial notice that Jensen Beach is about 40 miles from West Palm Beach and 15 miles from the northern border of Palm Beach County. RAND MCNEALY ROAD ATLAS 27 (1999).

the establishment of suitable alternative employment, I conclude, for two principal reasons, that West Palm Beach area is the relevant community for labor opportunity purposes. First, of the various locations, Mr. Conner spent the longest amount of time, 18 months, in the West Palm Beach area. His lengthy stay, in relative terms, is understandable given his medical, legal, personal, and economic ties to the area. By residing in the West Palm Beach area for a significant period of time, and in light of the deficiencies associated with the other locations, he established the West Palm Beach area as this principal residence for purposes of determining suitable alternative employment. Second, Mr. Conner is a highly transient claimant who has chosen a lifestyle that at times involves living on his sailboat. While Mr. Conner is certainly free to travel and live where he chooses, I find the employer faces undue prejudice in terms of evidentiary burden in this case by having to establish suitable alternative employment wherever Mr. Conner decides to drop anchor. Accordingly, the West Palm Beach area, including Jensen Beach, is the relevant community for the inquiry concerning suitable alternative employment.

B. Failure to Pursue Suitable Alternative Employment.

Since I have found that the West Palm Beach area is the relevant community and the parties have stipulated that since 1998 suitable alternative employment for Mr. Conner has existed in that area, I now consider whether Mr. Conner met his obligation under the Act to diligently look for work in the West Palm Beach area since Judge Guill's hearing.[19]

Unlike the facts before Judge Guill when Mr. Conner contacted employers on the labor market surveys and found no jobs available, Mr. Conner has admitted that he has not contacted any employer on the 2000 labor market survey and only five of the employers from the 1999 labor market analyses. Likewise, while Mr. Conner professed to have conducted weekly job searches through his stay in Florida as a prerequisite for receiving food stamps, Mr. Conner was not able to recall with any specificity who he contacted for work and the reasons he was refused an opportunity to work. And, also different than Judge Guill's hearing, Mr. Conner did not present in the hearing before me a job search log showing his employment efforts since June 1998. Mr. Conner also acknowledged receiving job leads from the Florida employment service but could not recall any specifics about those leads. Notably, Mr. Conner did not indicate whether he even pursued those leads. Instead, Mr. Conner stated he preferred to focus on jobs within his interest areas of water chemistry and the environment.

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[19]If the employer demonstrates that suitable alternate employment was available, then to meet his or her burden of proof to obtain total disability compensation benefits, a claimant must show he or she has tried to obtain such alternate employment but has been unable to do so. *Newport News Shipbuilding &Dry Dock Shipping Corp. v. Director, OWCP*, 784 F. 2d 687 (5th Cir. 986), *cert.* denied, 479 U.S. 826 (1986). New *Orleans (Gulfwide) Stevedores v.* Turner, 661 F.2d 1031, 1043 (5th Cir. 1981) *rev'g* 5 BRBS 418 (1977) and *Williams v. Halter Marine Service*, 19 BRBS 248 (1987). Otherwise, the extent of the employee's disability is partial, not total. *Director, Office of Worker's Compensation Programs v. Berkstresser*, 921 F. 2d 306, 312 (D.C. Cir. 1991).

Due to the lack of detail concerning his re-employment attempts in West Palm Beach and the absence of any documentary corroboration of those efforts, I find Mr. Conner has presented insufficient evidence of failed job seeking efforts from the end of June 1998 through November 1998 when he left West Palm Beach. After his departure, other than phoning five employers identified in May 1999 labor market survey, Mr. Conner did not look for work in the West Palm Beach area. In addition to noting that Mr. Conner did not indicate whether the five employers he phoned had job opportunities,[20] I also consider those few phone calls an insufficient effort considering that Mr. Steckler identified at least 23 potential jobs during this time frame. Finally, since I have determined that the relevant community is West Palm Beach, Mr. Conner's stated employment efforts in other locations after leaving Florida do not met his burden of proving that he was unable to find work in West Palm Beach after Judge Guill's June 1998 hearing.

Consequently, I find a change in conditions has occurred since Judge Guill's June 26, 1998 hearing because the preponderance of the evidence establishes that Mr. Conner no longer diligently looked for work in the West Palm Beach area. Accordingly, because the parties have stipulated that suitable alternative employment existed in the West Palm Beach area since 1998 and Mr. Conner has failed to prove such job opportunities were not either viable or reasonably available, Mr. Conner is no longer able to meet his burden of proof under the Act for a finding of total disability. Because Mr. Conner has not met his burden of proof for total disability, he is considered employable and, at the most, his disability is partial, not total. *See Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

Issue No. 3 - Extent of Disability

Since I have concluded that the Employer has established a change in conditions based on Mr. Conner's failure to continue to diligently pursue employment in the West Palm Beach area, I must now determine the extent of Mr. Conner's partial disability. Based on the parties' stipulation of fact, and consistent with Judge Guill's finding, suitable alternative employment existed in the West Palm Beach, Florida area through 1998, which includes June 26, 1998, the date of Mr. Conner's hearing with Judge Guill. Because Judge Guill rendered his decision based on the record up to June 26, 1998, the effect of his finding that Mr. Conner made a diligent job search in West Palm Beach area is effective only up to the date of his hearing. I have now determined that after June 26, 1998, suitable alternative employment existed but Mr. Conner no longer made a diligent effort to obtain such employment. As a result, his permanent total disability became a permanent partial disability as of June 27, 1998.

Because the Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment (*McBride v. Eastman Kodak Co.*, 844 F.2d 797 (DC Cir. 1988), any compensation for Mr. Conner's permanent partial

[20]According to Mr. Conner, he terminated his telephonic employment efforts relating to West Palm Beach because did not want to live in that area.

disability will be based on any adverse effect such a disability has on his ability to earn an income. For permanent partial disability, Section 8 (c), 33 U.S.C. § 908 (c), sets out a schedule of compensation for numerous specific physical impairments or losses. But, Mr. Conner's back injury is not one of the scheduled injuries. Instead, compensation for his permanent partial disability involving his back is determined by Section 8 (c) (21). Section 8 (c) (21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee at the time of the injury and the employee's wage-earning capacity thereafter in the same or another employment. The determination of wage-earning capacity used in the Section 8 (c) (21) calculation is defined by Section 8 (h). Any compensation is payable during continuance of the partial disability.

Section 8 (h) specifies that the wage-earning capacity of an injured employee under Section 8 (c)(21) is determined by his actual post-injury earnings, if those earnings reasonably and fairly represent his wage-earning capacity, or a reasonable wage earning capacity based on the nature of the injury, usual employment, and other factors. In addition, the courts and Benefits Review Board have indicated the post-injury wage-earning capacity must be adjusted to the wage levels which the job paid at the time of the injury. *See Walker v. Washington Metro Area Transit Authority*, 793 F.2d 319, 321 n.2 and 323 n. 5 (DC Cir. 1986) and *Bethard v. Sun Shipbuilding & Dry Dock Co.* 12 BRBS 691, 695 (1980).[21] Also, at least one court has stated that the reimbursement for loss of wage-earning capacity should be a fixed amount, "not to vary from month to month to follow current discrepancies." *White v. Bath Iron Works Corp.* 812 F. 2d 33, 34 (1st Cir. 1987).

With these principles in mind, I first find, based on the parties' stipulation of fact, that the average weekly wage at the time of Mr. Conner's injury on February 13, 1997, was $356.29. Next, since Mr. Conner did not have actual post-injury earnings, I look to the parties' other stipulation of fact that some of the positions identified as suitable alternative employment paid salaries at least equal to his average weekly wage. As a result, I find Mr. Conner's reasonable post-injury weekly wage-earning capacity to be $356.29.

Because the critical date for the determination of the amount of disability compensation is the date of injury, the BRB in *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 and 331 (1990), stated post-injury wages must be adjusted to wage levels that were paid at the time of injury. According to the BRB, since the U.S. Department of Labor's National Average Weekly Wage ("NAWW") is a more accurate reflection of wage changes over time than the Consumer Price Index, the post-injury wages should be adjusted downward to the time of injury using the NAWW. In *Cook v. Seattle Stevedoring Co.*, 21

[21]According to the BRB, Sections 8 (c) and 8 (h) require that the wages earned in a post-injury job be adjusted to represent wages which that job paid at the time of the claimant's injury. The Board explained, "This insures that wage-earning capacity is considered on equal footing with the determination under Section 10 of average weekly wage 'at the time of the injury' . . . During times of rapid economic inflation or deflation , the passage of even a few years can have a significant effect on the worker's wages and thereby distort the calculation of lost wage-earning capacity due to the injury."

BRBS 4, 7 (1988), the BRB further explained that in order to neutralize the effect of inflation, an administrative law judge must adjust the post-injury wage level to the level paid pre-injury so that the wage can be compared to the pre-injury average weekly wage.

Based on the rationale set out in *Richardson* and *Cook*, I need to translate Mr. Conner's weekly wage-earning capacity as of June 27, 1998, when I find his disability no longer prevented his return to employment, back to the wage level existing at the time of his injury in February 1997, using the National Average Weekly Wage ("NAWW") from 1997 and 1998. In February 1997, the NAWW was $400.53. On June 27, 1998, the NAWW was $417.87. Using the ratio of these two NAWW figures, 0.959 (400.53/417.87), to bring Mr. Conner's June 1998 weekly wage-earning capacity down to the February 1997 wage level, I find his June 1998 wage-earning capacity of $356.29 represents a February 1997 weekly wage earning capacity of $341.51 ($356.29 x 0.959).

After the adjustment based on NAWW changes, Mr. Conner's June 1998 post-injury weekly earning capacity, in February 1997 wage levels terms, is $341.51. That post-injury earning capacity is less than his pre-injury average weekly wage of $356.29. Consequently, under Section 8 (c) (21) of the Act, Mr. Conner is entitled to two-thirds of the difference between his pre-injury average weekly wage of $356.29 and his post-injury wage earning capacity of $341.51, or about $9.85 (($356.29 - 341.51) x 2/3).

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The March 23, 1999 Decision and Order issued by Administrative Law Judge James Guill is **MODIFIED IN PART** as follows:[22]

> A. The Employer shall pay Mr. DAVID L. CONNER compensation for **PERMANENT TOTAL DISABILITY**, due to an injury to his back on February 13, 1997, from May 1, 1998 through June 26, 1998, based on an average weekly wage of $356.29, such compensation to be computed in accordance with Section 8 (a) of the Act, 33 U.S.C. § 908 (a); and,
>
> B. The Employer shall pay Mr. DAVID L. CONNER compensation for **PERMANENT PARTIAL DISABILITY**, due to an injury to his back on February 13, 1997, from June 27, 1998 and continuing, based on the

[22]The provisions in Judge Guill's Decision and Order concerning temporary total disability, payment of interest, and medical care and treatment are not modified by my order.

difference between his pre-injury average weekly wage of $356.29 and his post-injury, weekly wage-earning capacity of $341.51, such compensation to be computed in accordance with Section 8 (c) (21) of the Act, 33 U.S.C. § 908 (c) (21).

2. The Employer shall receive credit for all amounts of compensation previously paid to the Mr. DAVID L. CONNER as a result of the back injury on February 13, 1997.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, D.C.